DOCKET FILE COPY ORIGINAL

RECEIVED
OCT 14 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Accounting for Judgments and Other Costs Associated with Litigation	)))	CC Docket No. 93-240

COMMENTS OF SCOTT J. RAFFERTY

This Commission should preclude all telephone companies from booking litigation costs to regulated accounts unless there is advance documentation explaining how the allegedly unlawful conduct benefited ratepayers. The cost allocation manual should be modified to preclude any allocation of costs for litigation against affiliates unless the regulated company is named as a defendant and is actually at risk. Billable costs should be limited to $250 per hour and, in the aggregate, to the amount claimed in damages or fine. Once a telephone company has been convicted of a federal crime, it should be required, for a period of five years, to obtain Commission approval before billing attorneys' fees to regulated accounts.

The experience of this Commission and of the New York Public Service Commission ("NYPSC") shows why these standards are necessary.

I was an officer of Telco Research, an unregulated NYNEX subsidiary. I was terminated after I questioned whether [redacted] activities violated an antitrust consent decree. I also objected to a proposed "software development contract" between the unregulated subsidiary and New York Telephone ("NYT") that violated the decree. The apparent objective was to transfer more than one million dollars of ratepayer monies to the unregulated subsidiary without any reasonable expectation that the software would be developed.

No. of Copies rec'd 0+9
List ABCDE

NYNEX reneged upon a settlement for less than $80,000 on the same day that the Justice Department announced that it had closed its investigation of this matter. I subsequently filed a civil action against NYNEX Corporation and its unregulated subsidiary. The Justice Department reopened its civil investigation, which subsequently led to indictment and conviction for criminal contempt of the antitrust consent decree. During a New York Public Service Commission proceeding, the New York Attorney General demonstrated that my complaint was part of a pattern of cross-subsidization and retaliation against the employees that objected to it.

Discovery in the New York proceeding showed that NYNEX had spent approximately $3.5 million for outside counsel in discovery proceedings in my civil action, plus $3 million in the pre-indictment phase of the Justice Department investigation. Discovery also demonstrated that NYNEX did not keep time records sufficient to quantify the extensive internal support dedicated to this litigation. NYNEX legal department costs, including outside attorneys fees, were allocated to regulated accounts according to "the legal allocating entity NYT percentage." In short, the mere fact that NYNEX Corp. pays the bills for an unregulated subsidiary results in almost 90 percent of the costs being borne by ratepayers without regard to any claim that they benefited from the defense.

In my case, the only connection to regulated ratepayers was that I alleged that they were victims of the unlawful cross-subsidies. There was no conceivable claim that the challenged misconduct benefited ratepayers in any possible way.

The NYPSC disallowed all expenses incurred in my litigation and allocated to NYT's intrastate jurisdiction. As the recommended decision explained:

> The question of who should bear the costs of defending against meritorious claims . . . is more problematic, but barring exceptional circumstances, we believe these costs, too, should be recoverable from ratepayers. [footnote: It may be appropriate to disallow legal expenses incurred in the defense of egregious conduct. . . .]
>
> On the other hand, it does not follow that NYT ratepayers should pay for legal expenses associated with litigation that does not involve NYT or that involves it only marginally. [The State Attorney General] has alleged that certain litigation costs included in the company's revenue requirement fit this description, and we are persuaded that this is true in at least two cases. The first is the private litigation styled Rafferty v. NYNEX, in which, as we understand it, NYT is not a party and the only allegations that relate to NYT portray it not as a wrongdoer, but rather as the victim of improper/unlawful conduct by NYNEX and its non-regulated subsidiaries. Whether Dr. Rafferty's claims in this lawsuit are meritorious or otherwise, we see no basis on which NYT ratepayers should be asked to foot the bill for NYNEX's defense. Similarly, United States v. NYNEX . . . also appears to focus on conduct by NYNEX and one of its unregulated affiliates, Telco Research. . . NYT argues that "[a] letter to the Grand Jury recently filed in United States v. NYNEX shows that [NYT's] compliance with Section V [of the MFJ] was a matter considered in the pre-indictment stages of] the investigation." . . . NYT does not provide a copy of the letter of any other support for its assertion. . . . [W]e cannot conclude that NYT had a stake in the case sufficient to warrant charging its ratepayers. Case 90-C-0191, RD at A-161 through A-164.

On June 27, 1990, I filed an informal complaint (subsequently numbered IC-91-01670) with this Commission, asking that the costs of this litigation be disallowed from the federal jurisdiction. On September 3, 1991, the informal complaints branch wrote me:

> We have reviewed the file on your case and believe that your allegations cannot be resolved through the informal complaint process. The [Informal Complaint] Branch has referred the matter to the Accounting and Audits Division of the Bureau for possible investigation or other appropriate action. Therefore, further action by the Branch is not warranted, and the Branch considers your informal complaint closed.

On September 23, 1991, I applied for review of this decision, which was taken under delegated authority. I have not heard of further action by the Commission or the Accounting and Audits Division.

Earlier this year, the New York Attorney General learned that NYT had violated the 1990 order by continuing to book expenses from my litigation to regulated accounts. On July 13, 1993, the Attorney General petitioned the NYPSC to impose a fine for NYT's misstatement of its accounting records.

As of July 1992, NYNEX had incurred approximately $10 million in outside legal fees, more than twice the total damage and fine claimed in the civil and criminal actions.

Rafferty v. NYNEX	$4,508,365
Telco Research	$2,434,123
United States v. NYNEX	$ 922,501
DOJ Investigation	$1,494,824
SUBTOTAL	$9,359,813
Insufficient detail to associate matter	$ 900,000
TOTAL	$10,259,813

According to court documents, one of the attorneys bills at an hourly rate of $485. The law firm also billed time of associates at $345. Nor has there been any discipline in the number of hours billed. The Honorable Thomas Penfield Jackson, to whom the case is assigned, has accused the firm of "overlawyering." The result is patently unreasonable costs.

In addition to my wrongful discharge case, there is at least one more wrongful discharge case and four racketeering cases. The arguments that ratepayers benefited either from the underlying conduct or from its defense are almost as attenuated. The same law firm is involved in many of these cases, presumably billing at the same unreasonable rates.

These costs pose an unreasonable burden on ratepayers. As victims of the improper transactions of which I complained, ratepayers should not pay a penny to defend the perpetrators. Nor should they finance the unsuccessful defense of criminal contempt of a consent decree that was designed to protect them. Yet, the outside counsel fees claimed for the defense of the my wrongful discharge case have already cost every NYT access line approximately 34 cents, and the criminal defense has cost another 20 cents. These do not include massive in-house expenses, which NYNEX has allocated, but failed to identify as relating to the Telco Research matter. Given the scope of the apparent illegalities at NYNEX, it appears that there may be many similar lawsuits creating continuing financial demands over a period of years. The complaint mechanism does not provide adequate and timely relief.

The Commission should adopt regulations to ensure that these expenses are properly recorded and excluded from rates. Independent of this proceeding, the Commission should review the closure of informal complaint IC-91-01670 and direct the Bureau to reach its merits.

Scott J. Rafferty
4730 Massachusetts Avenue
Washington DC 20016
D.C. Bar no. 318717
(202)-244-2966

Date: October 14, 1993